STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of JOHN WAYNE PATROSKE, a Protected Individual.

KENNETH SCHLACHT, CONSERVATOR,

Petitioner-Appellant/Cross-Appellee,

v

BETTE PATROSKE,

Respondent-Appellee/Cross-Appellant.

UNPUBLISHED
May 24, 2005

No. 253067
Wayne Probate Court
LC No. 76-673099-CA

Before: Neff, P.J., and Owens and Fort Hood, JJ.

PER CURIAM.

Petitioner appeals as of right an order dismissing his surcharge-of-fiduciary claim. Respondent cross-appeals as of right the denial of sanctions against petitioner. We affirm.

I

The parties to this case have a long history with each other and the case itself has a rather tortured background. John A. Patroske (John A.) and Bette Patroske (Bette) were married to each other and were business partners. John Wayne Patroske (John Wayne) is John A.'s son from a previous relationship; he is a mentally incapacitated and legally protected adult. John A. and Bette cared for John Wayne and were co-guardians of his estate. John A. died unexpectedly in 1983 and Bette was discharged as guardian of John Wayne's estate in 1986, but continued as guardian of his person.

Walter Schlacht (Schlacht) was a long-time employee of the Patroskes and eventually came to be a shareholder in at least one of the businesses they owned. After John A.'s death friction developed between Schlacht and Bette resulting in two lawsuits over business matters. There were also disputes between Schlacht and Bette over John A.'s estate as well as John Wayne's entitlement to assets from the estate. As pointed out in the trial judge's opinion, the

issues raised by Schlacht in this case in the context of John Wayne's interests "appear to have more to do with his conflict with Bette Patroske than with the well-being of John W. Patroske."

John A.'s estate was completed in 1992 with the allowance of the final account. Before Schlacht was appointed successor guardian and conservator of John Wayne's estate in 2002, an action proceeded against Bette that resulted in the entry of a surcharge order against her in 1996. The trial court notes in its opinion that this matter was decided on the merits and constituted a final decision. Schlacht then brought this second petition for a surcharge order, eleven years after John A.'s estate was closed and six years after the first surcharge petition was granted. Schlacht's petition was denied by the trial court on the basis of res judicata and laches in a well-reasoned written opinion. The court also denied Bette's request for sanctions and this appeal followed.

II

Petitioner claims that the petition for surcharge is not barred by res judicata. We disagree. This Court reviews the question of whether res judicata bars a subsequent action de novo. *Pierson Sand & Gravel, Inc v Keller Brass Co*, 460 Mich 372, 379; 596 NW2d 153 (1999).

The doctrine of res judicata is claim preclusion. "The doctrine bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first." *Adair v State*, 470 Mich 105, 121; 680 NW2d 386 (2004). This Court has taken a broad, expansive approach to the doctrine of res judicata, holding that it bars both claims already litigated, and also every claim arising from the same transaction that the parties, using reasonable diligence, could have raised but did not. *Id*.

In this case, the probate court stated:

> A review of the facts of the case at bar show that all of the requirements for applying the doctrine of res judicata have been satisfied. Walter Sakowski, the successor conservator, obtained a surcharge order against Bette Patroske for $10,000 on October 31, 1996 – a prior action decided on the merits. This order (a final decision) resolved all issues that were or could have been litigated by John Wayne Patroske against Bette Patroske for any malfeasance that may have occurred as a result of her failure to properly administer the conservatorship – including the question of distributions from the decedent estate. Walter Sakowski and Kenneth Schlacht are privies for res judicata purposes – i.e., they are both successor conservators and represented the same position vis-à-vis John Wayne Patroske. [Emphasis in original.]

There was a prior action for surcharge against respondent in 1995, with an order entered against respondent on October 31, 1996. This previous surcharge action, brought by petitioner's predecessor, Walter Sakowski, was based upon respondent's failure to account for the ward's social security benefits. The order for surcharge entered at that time was decided on the merits and serves as a bar to preclude any issues that were, or could have been, litigated in the prior

action. *Id.* Further, as successive conservators to the ward's estate, Sakowski and petitioner are privies. *Phinisee v Rogers*, 229 Mich App 547, 553; 582 NW2d 852 (1998), citing *Sloan v Madison Hts*, 425 Mich 288, 295-296; 389 NW2d 418 (1986). Because any claim against respondent in this matter was, or could have been, litigated in the prior surcharge action, the current claim is precluded by res judicata.

Petitioner also argues that the ward's claims should not have been dismissed on the basis of laches. We disagree. This Court reviews a trial court's decision in an equitable action de novo. *Webb v Smith* (*After Second Remand*), 224 Mich App 203, 210; 568 NW2d 378 (1997). This Court reviews the findings of fact supporting the decision for clear error. *Id*.

Laches "is applicable in cases in which there is an unexcused or unexplained delay in commencing an action and a corresponding change of material condition that results in prejudice to a party." *Public Health Dep't v Rivergate Manor*, 452 Mich 495, 507; 550 NW2d 515 (1996). Unlike the statute of limitations, laches is not primarily concerned with the fact of delay in bringing suit, but with the effect of delay. *Lothian v Detroit*, 414 Mich 160, 168; 324 NW2d 9 (1982). To prevail on a defense of laches, a respondent must show an inexcusable delay combined with prejudice as a result of such delay. *Id.; Gallagher v Keefe*, 232 Mich App 363, 369-370; 591 NW2d 297 (1998).

In this case, the petition for surcharge of a fiduciary was brought on May 5, 2003. There is approximately an eleven-year delay in the filing of the claim. The probate court's opinion stated:

> The facts in the case at bar are precisely the circumstances under which laches should be applied. The administration of John Patroske's Estate was completed on April 16, 1992 with the allowance of Bette Patroske's final account as successor personal representative. The Judge of record – Hon. Milton L. Mack Jr. – determined that the appointment of a guardian ad litem was not necessary as part of the estate administration process. The order allowing the final account was not appealed. Permitting litigation concerning Bette Patroske's purported mishandling of the estate at this juncture would constitute manifest prejudice and cannot be justified under the circumstances. Kenneth Schlacht's actions could be characterized as a lack of due diligence. In addition, he comes to the Court without clean hands.

In addition to the eleven-year delay, prejudice resulted from the delay. According to respondent, bank records are no longer available and important Probate Court documents are missing or have been removed from the file. Further, as the probate court stated, petitioner's actions could be characterized as a lack of due diligence. Because the records were presumably available and the claim could have been presented in the eleven years prior, petitioner cannot show due diligence. Laches was appropriately applied to bar petitioner's claim.

Because petitioner's claims are barred by res judicata and laches, petitioner's remaining issues need not be discussed.

III

Respondent argues on cross-appeal that the probate court erred in denying sanctions against petitioner and his counsel. We disagree. This Court reviews a trial court's finding regarding whether an action is frivolous for clear legal error. *Jerico Constr, Inc v Quadrants, Inc*, 257 Mich App 22, 35; 666 NW2d 310 (2003). A decision is clearly erroneous when the reviewing court is left with a distinct and solid conviction that a mistake was made, although there is evidence to support the decision. *Id.*

Pursuant to MCL 600.2591, a claim is frivolous when: (1) the party's primary purpose was to harass, embarrass or injure the prevailing party; (2) the party had no reasonable basis to believe the underlying facts were true; or (3) the party's position was devoid of arguable legal merit. *Id.* at 35-36. Plaintiff's inability to prove his case does not necessarily mean that the claim was frivolous. *Id.*

In this case, the probate court found that, "It appears that some irregularities may have occurred in Bette Patroske's administration of John Patroske's estate. However, it would be inequitable to allow these issues to be adjudicated after a lapse of over 11 years since the estate was closed." While plaintiff's claims were not successful, they were not completely groundless or "devoid of arguable legal merit." MCL 600.2591(3)(a)(iii). Therefore, the trial court did not err in denying respondent's motion for sanctions.

Affirmed.

/s/ Janet T. Neff
/s/ Donald S. Owens
/s/ Karen M. Fort Hood